No. 4129

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United States Circuit Court of Appeals

For the Ninth Circuit

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION.

BRIEF FOR DEFENDANT IN ERROR

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STATEMENT.

The defendant, Joe Temperani, prosecutes a writ of error to the United States District Court of the Northern District of California to reverse a sentence of conviction against him for three violations of the "National Prohibition Act."

On January 3, 1923, an Information in three counts was presented against the defendant; the charging portion of the first count was as follows:

> "Defendant heretofore, to wit, on or about 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully, and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit, 3 20-gal. stills; 3 oil-stoves; 1 hydrometer; 1500 gals. of mash,—then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

The charging portion of the second count was as follows:

> "Defendant, heretofore, to wit, on or about the 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there unlawfully and wilfully possess certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume

which was then and there fit for use for beverage purposes."

The charging portion of the third count was as follows:

> "Defendant heretofore, to wit, or or about the 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully manufacture certain intoxicating liquor, to wit, 25 gallons of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes."

It was set forth in each count that the act complained of was then and there prohibited, unlawful and in violation of specified sections of the "National Prohibition Act".

The defendant upon being arraigned pleaded not guilty (Trans. of Rec. p. 55). At the trial the defendant was found guilty as charged and was thereupon sentenced to pay a fine of $250 on the first count of the Information, to pay a fine of $250 on the second count, and to be imprisoned for a period of six months in the San Francisco County Jail on the third count.

At the trial, E. A. Powers, testified for the United States in substance as follows:

Witness is a Prohibition Agent and was on December 1, 1922. On that day he saw the defendant at 334 Orazabo Street, San Francisco, California, at his home. Another Agent, Walter Laumeister was with witness. On that day witness received information that defendant was operating a still in the basement of his residence and the Agents investigated and "you could smell it half a block away. You could smell the mash from the stills". The agents rang the bell upstairs. There was no answer. They went to the garage and rear and there was no answer and they walked through the rear door. The entered the basement or garage. It was locked. To get in they shoved the door in. They forced the entrance. They found three twenty-gallon stills in full operation and found a hydrometer and 1500 gallons of mash and twenty-five gallons of jackass brandy. They waited there about five minutes afterwards the defendant drove up in a Cole car. He stepped from the car. The Agents asked if it was his premises and he said "yes" and the agents walked into the garage with the defendant and he admitted they were his stills. Defendant was asked "These are your stills, Temperani?" He said, "Yes. Who told you I was operating?" Three 20-gallon stills were on stoves and were burning and the mash was cooking. The boilers were full of mash and the stills were full of mash and the fire was burning under them. They were operating. It was in process of distillation. Besides the three stills the Agents found one hydrometer, 1500 gallons of mash and twenty-

five gallons of brandy. The agents had information that he was running the still; that he was manufacturing (Trans. of Rec. pp. 78-79). The brandy was in a sort of container and dropped from the cooler into the container. The defendant did not say the brandy belonged to him. He said the stills and apparatus were his. A sample of the brandy was taken. Witness identifies the bottle.

On cross-examination, witness testified that he did not have a search warrant to search the premises in which the defendant is accused of having this property. The premises were a one-story building and basement. The agents entered through the rear into the still room, the basement or garage. It was not a furnished basement. There was plenty of room for the car. It was not connected in any way by opening a door on the stairway with the residence, "or with the upper or residence part of the building." Agents had to enter from the outside. The first information was received from Police Sergeant Tutenberg. He told witness that there was a still being operated in the basement of Temperani's home. Laumeister and witness went to the premises because they had the information. That was the primary reason for his going. When they got to the place they went to the front of same. They could smell it a half block away. They investigated and found the smell came from that particular place. You could smell the strong odor until you got right there. The agents tried the garage door. Did not

see any still then. Went to the front door upstairs. Rang the bell and got no response. Then witness walked around to the back door. The place was enclosed by a fence and had a side entrance. Witness opened the door to the side entrance and walked into the yard and tried to force the door leading into the garage. It did not open. Witness shoved it in. The basement and garage are all in one place. It was not subdivided off at that time. Witness broke the door leading into the garage. Could see the stills as soon as the door was open. Did not go into a rear room. Went directly from the yard into the garage. Did not at any time enter any of the rooms in the "dwelling or upper part." Witness went directly from the yard into where the stills were operating. Did not break any other door to go into the place where the garage was. Did not notice what was in the basement besides the garage for the automobile other than a couple of cases of dried apricots in the basement. Did not investigate the property. There were steps leading from the front of the house to the street. The basement and the dwelling house were on the same lot. The basement formed a part of the building. Witness was never upstairs at all in the house, nor was Agent Laumeister (Trans. of Rec. pp. 80, 81, 82, 83). Witness continuing: Had no knowledge that the defendant at that time lived at any other place. Witness never made a purchase from the premises. When witness first went to the premises, defendant was in there and there was no automobile there. He drove up to the side of the

house in a Cole-Eight along side of the fence. He stepped out and walked into the basement. First he claimed he did not own it and then he did. We did not take him into custody before we went into the place. He walked into the place with us. It was a basement that they could store a machine in. The defendant told me it was a garage and afterwards said that he did not keep his machine in there but kept it elsewhere. The basement was not a finished basement. There was room for an automobile. There was a large door.

On re-direct witness testified: That the three copper receptacles shown were stills for making brandy. That he can identify the stills as those referred to in his examination and were seized December 1, 1922, at 334 Orazabo Street. They were seized by witness and Agent Laumeister and were in full operation at the time witness went there. Witness dumped the brandy in the sewer and poured coal oil into the mash. Witness seized the brandy in the basement. It was running from the cooler into the container. Witness destroyed 25 gallons. Did not see the defendant in that place manufacture any brandy. Witness saw the material, however, in the process of manufacture (Trans. of Rec., p. 85). It is further shown that the spirits referred to contained 59.79 per cent of alcohol by volume. Thereupon the stills were put in evidence and later the bottle of spirits taken at the same time was put in evidence.

The defendant Temperani testified on his own behalf and said that on December 1, 1922, he lived on Orazabo Street with his wife and children. Witness claimed to occupy two rooms upstairs and one down stairs; that he had food in the basement; that there was a garage in front and that it was partitioned off for food for the house. There were steps leading up from the back of the place to down stairs in the yard and that witness and family would use the back steps to go to the basement several times a day. The kitchen was in the upper floor. To go from the kitchen to the back yard you would go from the back door down the stairs into the back yard.

On cross-examination defendant was asked "were these three stills in evidence in the basement of your premises on December 1, 1922". Witness answered "when the men got there they found them in the basement" and "when they came there they found them in the basement". Witness was asked how they got there and said he brought them there. Witness was asked if there was any mash there at that time and answered there were two barrels. He was asked if there was any brandy and he said he didn't think there was any there. He was again asked if there was any jackass brandy in quantity about 25 gallons there on that date and he said he did not believe there was and then said he didn't know. He said he didn't know whether the stills were in operation. He said he went away in the morning

and didn't know whether the stills were going or not. (Trans. of Rec. pp. 87, 88, 89, 90, 91).

Previous to the trial the defendant made a motion for the return to him of the property seized and for the exclusion of the same from evidence, the petition being verified. It was contended that the property was taken in violation of the Fourth and Fifth Amendments. In opposition to the motion the government presented the affidavit of Agent Laumeister who stated that he was a Federal Prohibition Agent acting as such under the Federal Prohibition Director for the State of California and thereupon deposed as follows:

> "That the premises at 354 Orazabo Street in the City and County of San Francisco, State of California, is a one-story building with a garage underneath; that the opening to the garage is from said Orazoba Street, which said garage is disconnected from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the first day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from the said garage. That thereafter, and upon the first day of December, 1922, affiant together with the other Prohibition Agent, were near the premises, to wit, No. 354 Orazabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used

in the manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other Prohibition Agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there properly designed for the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one percentum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and other Prohibition Agent found three coal-oil stoves lighted and burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicating liquor, to wit, jackass brandy, and 25 gallons of intoxicating liquor, to wit, jackass brandy containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other Prohibition Agent then and there seized the above-mentioned property and the same is now in the posession of the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That thereafter the said defendant, J. Temperani, stated to affiant that the said stills and the property hereinbefore mentioned belonged to him and that he was manufacturing the said intoxicating liquor. That thereafter, and on the said first day of December, 1922, affiant arrested the said defendant J. Temperani and filed an information charging the said defendant with

having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20 gallon stills, three coal oil-stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacture of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of the said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession.

That affiant did not nor did the other Prohibition Agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other Prohibition Agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, and with the odor of intoxicating liquor, to wit, jackass brandy, manufactured by the distillation of mash and containing one-half of one percentum and more of alcohol by volume and fit for use for beverage

purposes. That at all of the times herein mentioned said liquor was illicit and contraband."

The motion was denied by Judge Bean.

At the trial of the case, immediately following the empanelment of the jury, the defendant renewed his motion and read to the court his said verified application and thereupon the government read in response the above mentioned affidavit of Laumeister. The motion was denied by Judge Van Fleet, who was trying the case. When the contraband property, the stills and the sample of the brandy were offered in evidence, the defendant objected to their introduction. The objection was overruled and they were received in evidence. (Trans. of Rec. pp. 86 and 93.)

The defendant made a motion for a directed verdict of not guilty which was denied. (Trans. of Rec. p. 97.) The charge of the court appears at pages 98-101 of the Trans. of Rec. The defendant did not take any exceptions to the charge, nor did he propose any instructions on his own behalf.

The plaintiff in error has made thirteen assignments of error, but appears to mean by them the single point presented by him in his brief. The only question urged or argued by the plaintiff in error in his brief is stated by him as follows:

"The Court erred in admitting in evidence property taken from the defendant's dwelling and information obtained in violation of the

fourth and fifth amendments to the Constitution of the United States, on account of the unreasonableness of the search and seizure, in that Federal Officers had no search warrant to search the dwelling of the defendant, or a private place in same, or to seize property therefrom."

No objections are taken to the charge, nor to the sufficiency of the Information. We confine our discussion to the single question argued.

ARGUMENT.

THE SEIZURE OF THE 20 GALLON STILLS AND THE MASH AND BRANDY WAS NOT UNREASONABLE NOR ILLEGAL; IT WAS INCIDENT TO A LAWFUL ARREST; NO WARRANT WAS REQUIRED. THE ARTICLES SO SEIZED WERE COMPETENT EVIDENCE.

It was shown at the trial that two Prohibition Agents, coming to know from the sense of smell that there was being distilled in the basement beneath the residence of defendant intoxicating liquors, thereupon entered, seized three 20-gallon stills and stoves in flagrant active operation, also 1500 gallons of mash and 25 gallons of jackass brandy. The mash was rendered innocuous, the brandy all destroyed except the sample, and the stills seized and produced in court and received in evidence. The defendant admitted the ownership of the stills and that he "was operating."

That the testimony so offered and received was *relevant* is indisputable. That it was *sufficient* to prove the defendant guilty as charged is equally clear. The sole controversy now raised by the defendant is as to the *competency* of the particular evidence as against him. He bases his objection on such incompetency to the fact that the taking was made without a search warrant.

We may observe in passing that this question of *competency* is to be decided by the court upon such proof taken on *voir dire* as may be convincing. The offer on its face was apparently competent. It thus became the obligation of the defendant to show by outside facts anything he could as against such competency. This he undertook to do in advance of the trial by a motion for return of property and suppression of the evidence; this was in accordance with the decisions holding that if the objection be not raised until the time of trial, the court will not suspend to determine a collateral issue. This preliminary motion was renewed after the empanelment of the jury and before the taking of evidence upon the same proof, that is to say, upon affidavits. It thus results that in determining this question of competency, the court could have considered the affidavit of Agent Laumeister, who was not produced at the trial, as well as the oral testimony of Agent Powers who testified at the trial.

The defendant grounds his objection to the competency of the evidence in part upon the provisions

of Section 25 of Title II of the "National Prohibition Act," which provides generally that "no search warrant shall issue" except under certain circumstances. But no consideration need be given to this section nor to the cases applying it for the reason that it is nowhere contended that there was any search warrant issued. And to defendant's citation of the provisions of the Fifth Amendment to the Constitution of the United States in the same connection, it is sufficient to note that the inhibition of that Amendment was not against searches or seizures without warrant, but as "against unreasonable searches and seizures."

And, as certain of the cases hereinafter cited point out, at the time of the adoption of the Amendment it was a well recognized exception to the rule requiring a warrant for a search or seizure, that an officer might without such warrant arrest a person committing a crime in his presence and thereupon search his person or immediate surroundings and seize the thing by means of which he was committing the crime. The seizure of the offending things in the instant case is here justified by the government as within the principle so invoked. We are unable to see how there could be any serious contention that when the officers detected the odor of cooking mash as coming from the basement and thus came to know that the "National Prohibition Act" was being flagrantly violated then and there, they had not the right to arrest the defendant, which they did, or that they had not the right to arrest or

seize the offending thing and thus interrupt the commission of a crime and this without any warrant therefor. Neither the arrest of the defendant or of the offending things was an unreasonable search within the purview of the amendment. We cite the following cases holding and applying the principle.

This Court in the case of

Vachina vs. U. S., 283 Fed. 35, 36,

said:

> "The Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures, is to be construed in conformity with the principles of the common law. At common law officers may arrest those who commit crimes in their presence, and they may avert a crime in the process of commission in their presence, by arrest, and without a search warrant they may seize the instrument of the crime. *Bishop, New Crim. Proc.* Sec. 183; *Byrne, Federal Crim. Proc.* Sec. 10. The question which is here presented was before this court in *Kathriner v. United States,* 276 Fed. 808, which we held, under circumstances almost identical with those here disclosed, that liquor may be seized without a search warrant. Other similar rulings are found in *United States v. Borkowski* (D. C.) 268 Fed. 408; *United States v. Camarota* (D. C.) 278 Fed. 388; *In re Mobile* (D. C.) 278 Fed. 949; *United States v. Snyder* (D. C.) 278 Fed. 650."

The same rules applied by this court in the case of

Lambert vs. U. S., 282 Fed. 413, 416,

wherein this court said:

> "What is prohibited by the Fourth Amendment of the Constitution, as will be seen from the foregoing, is the unreasonable search or seizure of the person, home, papers, or effects of any of the people of this country without a warrant issued upon reasonable cause, supported by oath or affirmation particularly describing the place to be searched and the person or thing to be seized. It is not claimed that either of the officers who made the search and seizure here involved acted by virtue of any warrant, or that they made any attempt to procure a warrant upon the information conveyed to them by Edison. Under the circumstances of the case, was that essential?
>
> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case."

In the case of

Dillon vs. U. S., 279 Fed. 639, 647,

the Circuit Court of Appeals of the Second Circuit applied the same principle and quoted with approval from the case, *ex parte*

Morrill, 35 Fed. 261, 267,

as follows:

> "In other words, a crime is committed in the presence of the officer when the facts and cir-

> cumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to to believe, or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime."

And referring to a case previously decided in the same court said:

> "And in *Wiggins v. United States,* 272 Fed. 41, 45, we stated our belief that, where liquors were being sold in violation of law, the officers, who witness the commission of the offense, have as much right to seize the liquors without a search warrant as they have to apprehend the wrongdoer without a warrant of arrest. We see no violation of any constitutional right of the defendant in taking possession of the liquors, which the defendant had in his unlawful possession and of which an unlawful use was being made in the presence of the officers."

In the case of

McBride vs. U. S., 284 Fed. 416, 419,

the Circuit Court of Appeals of the Fifth Circuit applied the same principle and said:

> "At common law it was always lawful to arrest a person without warrant, where a crime was being committed in the presence of an officer and to enter a building without warrant, in which such crime was being perpetrated. *Wharton, Criminal Procedure* (10th Ed.), Secs.

34, 51; *Delafoile v. New Jersey,* 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500, 502; *In re Acker* (C. C.), 66 Fed. 290, 293.

Where an officer is being apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant. *Piedmont Hotel v. Henderson,* 9 Ga. App. 672, 681, 72 S. E. 51; *Earl v. State,* 124 Ga. 28, 29, 52 S. E. 78; *Brooks v. State,* 114 Ga. 6, 8, 39, S. E. 877; *Ramsey v. State,* 92 Ga. 53, 63, 17 S. E. 613. Therefore we are of the opinion that the entry into this stable under the circumstances of this case was legal, and that the court did not err in admitting the testimony of the officers."

The evidence of the commission of crime in the McBride case was derived principally or wholly through the sense of smell.

The case of

U. S. vs. Borkowski, 268 Fed. 408, 412,

was a case of the same character wherein the officers through the sense of smell came to know that a crime was being committed. The District Court in that case said:

"The rule, state and federal, is that officers may arrest those who break the peace or commit crimes in their presence. *Bishop's new Crim. Proc.,* Sec. 183; *Byrne, Fed. Crim. Proc.,* Sec. 10; *Wolf v. State,* 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and restraining

the instrument of the crime. See also *Ross v. Leggett,* 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex parte Morrill* (C. C.), 35 Fed. 261; *Bad Elk v. U. S.,* 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and *Kurtz v. Moffit,* 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Other pertinent cases turning upon the principle that an officer may make an arrest for a crime committed in his presence without a warrant and as incident to such lawful arrest, may make a further search of the person and surroundings of the party arrested, are the following:

U. S. vs. Daisin, 288 Fed. 201
Kathriner vs. U. S., 276 Fed. 808
O'Connor vs. U. S., 281 Fed. 396
Green vs. U. S., 289 Fed. 236
U. S. ex rel. Flynn vs. Fuellhart, 106 Fed. 911.

As against this array of authorities, the contention of the defendant as we understand it is: that under the provisions of the Act supplemental to the National Prohibition Act of November 23, 1921 (C. 734, Sec. 6, 42 Stat.) (*Barnes Fed. Code Cumm. Supp.* 923, 750) there was a violation of his rights in that his dwelling was searched without a warrant. The Act in question was supplemental to the National Prohibition Act and it is not presumed that there was any intention to make the Act less effective. It is provided generally in the supplemental Act that *any* officer, agent or employe of the United States engaged in the enforcement of the Prohibition Act *or any other law of the United States,* who shall search any private dwelling as defined in the Prohibition Act and occupied as such dwelling without a warrant directing such search is guilty of a crime.

There is no provision in this Act against the lawful arrest without warrant for a crime committed in the presence of the officer. It is significant that the word "search" alone is used and nothing is said of a "seizure." The Act does not manifest any purpose to prevent an officer from making an arrest for a crime committed in his presence simply because it happened to be in in a private dwelling; such an assumption would involve startling consequences. The best test of the argument is to invoke the *reducio ad absurdam.* The Act in terms refers to all possible officers of the United States and all possible crimes. No distinction is

made between a crime detected by one sense rather than another. Hence we would have the situation of an officer of the United States seeing a grave crime actually being committed, even murder, and yet if it were in a private dwelling house occupied as such, he would not have the right to make an arrest or seizure, or make any search thereafter incident to such an arrest or seizure. It has all along been the rule that an officer detecting a crime being committed in his presence may arrest the *person* or the *offending thing,* such as an automobile or a still; he has the right and power, in fact it is his pre-emptory duty to *interrupt* and *prevent* the *actual commission* of the *crime.* There is no warrant for assuming that the Congress in passing the supplemental Act in question intended to change the rule of law permitting an officer to arrest for a crime committed in his presence and make a search incident thereto. The only purpose was to punish the making of an unreasonable search, not to alter the law as to *what was* such unreasonable search.

That there was no such change, the case of

Agnello vs. U. S., 290 Fed. 671,

is authority. There the officers, on the evidence of their senses, detected the defendants or some of them in the actual commission of the crime of selling narcotics. Having arrested the defendants, the officers went to the residence of two of the defendants—the Agnello's—and found certain narcotics which they took into their possession. It was con-

tended that while admittedly the agents had the right to arrest the defendants without a warrant, and had a right to search their persons without a warrant, a crime having been committed in the presence of the agents, it was denied that they had the right to go from the place of arrest to another point and there search without a warrant the room of one of the defendants. From the facts so stated, the court suggests the question: that in case an agent arrest without warrant and search the person, is it an unreasonable search and seizure to also search the home without warrant? After consideration, the court reaches the conclusion that the search and seizure of the home was not unreasonable. The court in discussing the question reviews the pertinent authorities hereinabove cited, as well as others, including several of the decisions of this court.

It may be noted further that the incidents complained of in the Agnello case were said to have been on Saturday, January 14th, which would indicate the year 1922, and thus since the enactment of the act supplemental to the National Prohibition Act. The case is further of interest in that it limits and distinguishes to some extent the case of

Ganci vs. U. S., 287 Fed. 60,

decided by the same court and cited here by plaintiff in error.

A brief reference may be made to the citation of authority in the brief of plaintiff in error. Some

35 cases are cited on pages 32 et seq. of the brief without further comment than that they justify him in declaring that the search and seizure in the instant cases was illegal. As to many of them their bearing on the particular question is exceedingly remote and do not justify detailed reference. Another list is cited on page 39 of the brief.

A special reference is made to the cases of

U. S. vs. Fallaco,
U. S. vs. Ross, 277 Fed. 76.

It may be noted that these cases were by the District Court wherein the Judge only discussed the question as to what participation by Federal Officers in a search by State Officers would bind the Government and render the evidence inadmissible in the case of an unlawful search. No discussion whatever was made as to the principle here invoked upon which this case really turns, that is to say, that the officers had the right to arrest and seize for the crime committed in his presence. There may have been something in the undisclosed facts that would have prevented the application of the principle. At any rate the question was not discussed and there can be no authority as against the cases hereinabove cited.

Detailed reference is made to the Ganci case as to which it is sufficient to note that the Agnello case in the same court limited the operation of the Ganci case.

The cases of

U. S. vs. Kelih, and
U. S. vs. Jajeswich

are referred to at length. These were cases where officers acted upon the sense of smell. The decisions were by District Courts where the court was authorized to use its discretion in believing that there was probable cause and may have been fit to disbelieve the officer's statement that he could smell thus and so. But in the case at bar the court below did believe the officers and there is nothing in the case at bar to show that its discretion in so believing was abused. This court in its opinion in

Winkler vs. U. S., No. 4159, Opinion filed March 24, 1924,

cited with approval certain language from the case of

Snyder vs. U. S., 285 Fed. 1,

to wit:

> "Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge and his finding should not be disturbed on appeal unless it is without support in the evidence."

In the instant case the court sustained the view that the officers had probable cause for knowing that a crime was being committed. In the cases cited by counsel certain District Courts reached contrary conclusions. There is nothing here to show

that the trial court abused its discretion or did not have evidence upon which to base its conclusion.

In brief, we have the case of two officers charged with the duty of enforcing the National Prohibition Act. They swear that at the time in question they detected in a basement beneath the rooms in which the defendant dwelt the odor of cooking mash and the odor of jackass brandy. Thereupon in order to interrupt the commission of a crime, to seize an offending thing, the stills, and to arrest the parties committing the crime, they enter the basement, find the three stills, with fires burning, full of mash and the spirituous liquors running through the pipes into the containers. 1500 gallons of mash were at hand for further use. 24 gallons of brandy had been manufactured. The defendant admitted he "was operating" and that he owned the stills; he so testified at the trial. There is but a single question involved in the case and but a single question argued, that is, were the officers justified in making the arrest and seizing the property without the delay of attempting to obtain a warrant?

We think the judgment should be affirmed.

Respectfully submitted,

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